

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
	:	
v.	:	
	:	
	:	
ISAAC GARDNER	:	
	:	NO. 01-610
	:	
	:	
	:	

Newcomer, S.J.

April , 2002

O P I N I O N

Presently before the Court is defendant's Motion to Suppress Physical Evidence. For the reasons set forth below, said motion is denied.

BACKGROUND

In the late evening hours of September 7, 2000, The Quick Six Bar, located in Northeast Philadelphia, was robbed by a lone gunman. Police arrived on the scene shortly thereafter and confirmed and updated a "flash information" bulletin which was immediately broadcast over police radio. The bulletin alerted police in the area that the perpetrator was "a black male, six foot in height, with an Afro, wearing a white T-shirt that had a black label on the back, and dark or blue jeans...last seen on foot."

Less than ten minutes after the robbery and fewer than

four blocks from the bar, Officer Jose Silva, who was responding to the robbery call, passed an automobile which was traveling away from the bar in what appeared to him to be a suspiciously slow manner. As Officer Silva's patrol car slowly passed the vehicle, he saw that it contained three black males. Moreover, it appeared to him that the front passenger matched the description reported moments before in the flash information bulletin. Officer Silva turned his patrol car around and stopped the car. While waiting for backup Officer Silva noticed that the passenger on the rear right side of the car leaned down as if he were placing something on the car's floor. After backup arrived Officer Silva approached the vehicle and when shining his flashlight into the rear right window was able to see the butt of a handgun resting on the floor protruding from underneath the front seat. All occupants of the car were asked to get out and were frisked. Another handgun, the object of the instant Motion to Suppress, was found in the waistband of the car's front seat passenger, the defendant in the case at hand. The defendant filed the instant motion alleging his Fourth Amendment rights were violated by an unconstitutional search and seizure.

ANALYSIS

I. The Terry Standard

It is clear that "where a police officer observes

unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot," the officer may briefly stop the individual and make "reasonable inquiries" in order to substantiate or allay his suspicions. Terry v. Ohio, 392 U.S. 1, 30 (1968). Further, in the interests of safeguarding law enforcement officers and the public at large from violence which may occur during such encounters, officers can conduct a "limited protective search for concealed weapons" when officers are "justified in believing that the individuals whose suspicious behavior they are investigating at close range are armed." United States v. Rideau, 969 F.2d 1572, 1574 (5th Cir. 1992); Terry U.S. 1, 27 (1968). Thus, there are essentially two aspects of a Terry stop, first, the investigation of the crime itself, second, a protective search of the suspect. Each aspect comes with a separate standard. We turn now to whether the government meets the two Terry standards in the seizure and search of defendant Isaac Gardner in the case at hand.

A. Investigation of the Crime

The first question before the Court is whether Officer Silva was justified in stopping the car in which defendant Isaac Gardner was riding. Terry permits an officer to stop a moving car and question its occupants when the officer "observes unusual conduct which leads him reasonably to conclude in light of his

experience that criminal activity may be afoot." Terry, U.S. 1, 30 (1968); see also United States v. Hensley, 469 U.S. 221 (1985); United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975); United States v. Nelson, 2002 WL 459830 (3d Cir. 2002)(Rendell, J.). The totality of the circumstances show that Officer Silva witnessed sufficient conduct giving rise to a reasonable suspicion of criminal wrongdoing.

Moments before seeing the car in which the defendant was riding, Officer Silva heard the flash information bulletin which described the perpetrator as "a black male, six foot in height, with an Afro, wearing a white T-shirt that had a black label on the back, and dark or blue jeans...last seen on foot." Officer Silva was enroute to the robbery scene, however, his attention was diverted when he saw a car proceeding in the opposite direction of the bar at a suspiciously slow pace. Officer Silva testified to the car's geographic proximity to the location of the robbery (four blocks) and short time which had elapsed since the robbery (less than ten minutes). More significantly, Officer Silva testified to what he saw as his patrol car slowly passed the car which he was observing. He explained he could see the front passenger and described what he saw as a black male wearing a white T-shirt who appeared to have an afro-like hairdo and, based on his height while seated in the car, appeared to be tall in stature. These observations bear a

strong resemblance to the flash bulletin broadcast on police radio. Although the bulletin indicated that the perpetrator fled on foot, it is possible that he acquired the use of an automobile after leaving the bar. Coupled with the geographic and time proximity to the robbery, these facts, taken in totality, support the proposition that Officer Silva could very reasonably conclude that the passenger in the car may have been the perpetrator and was therefore justified in making the stop.

The defendant called Officer Silva's testimony into question by eliciting the testimony of Anthony Jackson, the driver of the car. Mr. Jackson testified that the defendant wore a flannel blue shirt over his white T-shirt the night they were stopped by Officer Silva. The Court gives little weight to this testimony as Mr. Jackson's testimony did not seem credible. Specifically, he was conveniently able to recall with precision what the defendant wore that night but was unable to recall what the other passenger in the car was wearing. In addition, the Court notes that although Mr. Jackson denies speaking with either the defendant or his counsel about this matter or any other matter, at one time Mr. Jackson and the defendant were housed at the same correctional institution after riding together in the car on September 7, 2000.

The defense impeached the testimony of Officer Michael Wilson, the arresting officer, who earlier testified before a

grand jury that the defendant's blue shirt was buttoned up and testified before this Court that it was left open. Regardless, for the purposes at hand, the only question is whether Officer Silva was able to see a white T-shirt when first noticing the defendant. The defense offers no evidence to call into question Officer Silva's testimony that he saw the defendant in a white T-shirt. It is indeed possible if not probable that the defendant wasn't wearing the blue shirt when Officer Silva spotted him, but rather, put the blue shirt on after being pulled over in an attempt to conceal the gun sticking out of his waistband. Officer Silva called for backup after the vehicles came to a stop and there were several minutes during which time the defendant could have put on the blue shirt. Likewise, it is possible that the blue flannel shirt was open when Officer Silva spotted the defendant and was then buttoned up before backup arrived, again, as part of an attempt to conceal the weapon. Regardless, the bottom line remains, there is no evidence which calls into question Officer Silva's testimony that he was able to see a white T-shirt at the time he first spotted the defendant.

B. Protective Search

The standard which must be met in order to properly conduct a Terry protective search is, "whether a reasonably prudent man in the circumstances would be warranted in the belief

that his safety or that of others was in danger." Terry, U.S. 1, 27 (1968). Officer Silva was clearly warranted in believing that his safety and the safety of his fellow officers was in danger. When initially approaching the car he noticed the butt of a handgun on the floor of the backseat area. This finding in itself gives a reasonably prudent man the belief that his safety or that of others was in danger. In addition, Officer Silva believed he was stopping an armed robbery suspect fleeing the scene of the crime. Such a fact in itself gives rise to a reasonable belief that he and his fellow officers were in danger. Therefore, the officers' protective search of the defendant and his fellow passengers was certainly warranted under the Terry protective search standard.

AN APPROPRIATE ORDER SHALL FOLLOW.

Clarence C. Newcomer, S.J.

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O R D E R

AND NOW this day of April, 2002, upon consideration of defendant's Motion to Suppress Physical Evidence, the Government's response as well as the evidence presented by both parties during the April 11, 2002 hearing before this Court, it is hereby ORDERED that said motion is DENIED.

AND SO IT IS ORDERED.

Clarence C. Newcomer, S.J.